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In the Supreme Court of the United States

OCTOBER TERM, 1983

MICHAEL EUGENE WEECH AND
RICHARD VERNON WRIGHT, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioners are entitled to a new trial on the ground that the government withheld material exculpatory evidence.

2. Whether the district court erred in refusing to suppress petitioners' statements made in telephone calls in the presence of a DEA agent.

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OPINION BELOW

The judgment order of the court of appeals (Pet. App. 1-2) is reported at 701 F.2d 188.

JURISDICTION

The judgment of the court of appeals was entered on March 1, 1983. A petition for rehearing was denied on April 11, 1983 (Pet. App. 14). The petition for a writ of certiorari was filed on June 9, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of Florida, each petitioner was convicted of conspiracy to possess and possession with intent to distribute marijuana, in violation of 21 U.S.C. 846 and 841(a)(1). Petitioner Weech was sentenced to treatment

and supervision pursuant to the Federal Youth Corrections Act, 18 U.S.C. 5010(b), and petitioner Wright was sentenced to concurrent four-year terms of imprisonment, followed by a special parole term of three years (Pet. App. 3-4).

1. The evidence at trial showed that on January 21, 1982, petitioners, who were on the bridge of the Happy Days, a 48-foot sport fishing boat (1 Tr. 20, 70), were stopped by Coast Guard officers in United States waters near the Florida Keys. Petitioner Wright identified himself as the captain of the boat (1 Tr. 78-79). The odor of marijuana was strong aboard the vessel (1 Tr. 65, 87-88), and the officers found 205 bales of marijuana (totaling approximately 7,200 pounds) piled in the cabin (1 Tr. 22-23, 94, 96-97, 107). The officers also found electronic equipment on the vessel and a ship radio set to monitor the Coast Guard frequency (1 Tr. 20-22, 24). In addition, they found a bag containing clothing belonging to petitioner Wright among the marijuana bales on the Happy Days (1 Tr. 31).

At trial, petitioners objected to the introduction of statements they made during post-arrest telephone calls in the presence of a DEA agent. Following a mid-trial suppression hearing (2 Tr. 4-23), the trial court denied petitioners' motion to suppress. The court observed that even if there were a constitutional right to make a private telephone call, such a right would have been waived when the statements were made while the DEA agent was standing nearby (2 Tr. 23). The trial court also denied petitioners' motion for a mistrial based on the government's failure to make certain information available to the defense (2 Tr. 3).

2. The court of appeals affirmed in a per curiam opinion (Pet. App. 1-2). The court of appeals concluded that the evidence of guilt as to both petitioners was overwhelming; in addition, it concluded that the trial court acted well within its discretion in denying petitioner Weech's

severance motion and petitioners' motion to suppress and motion for a mistrial based on allegations that the government failed to disclose *Brady* information (Pet. App. 2).

ARGUMENT

1. Petitioners contend (Pet. 12-18) that the government withheld evidence that would have supported their defense at trial. That contention is without merit. The record shows that all the matters petitioners now raise were fully presented to the jury.

At trial petitioners attempted to present an innocent explanation for their presence on the boat with its cargo of marijuana. They testified that they boarded the Happy Days shortly before their arrest, at the behest of a Latin male and his two companions, in order to repair the engines (2 Tr. 92-103, 180-186). Petitioners explained that after they boarded the Happy Days the three original occupants offloaded packages onto a Cigarette speed boat and departed, leaving instructions with petitioner Wright to radio them if he were able to start the boat (2 Tr. 96-99, 182-183).

Petitioners first contend (Pet. 13-14) that the government withheld the name and location of the marina to which the Happy Days was towed. They claim that timely production of that information would have enabled them to track down leads to bolster their story that the boat was in poor running condition. It is unlikely that the name and location of the marina qualify as exculpatory evidence the government was required to disclose under *Brady v. Maryland*, 373 U.S. 83 (1963). Even if petitioners had been informed of the name of the marina and, by pursuing that avenue of inquiry, established that the Happy Days was brought there needing substantial repair work, that evidence would not have suggested that petitioners were innocent. A mechanical breakdown would not be inconsistent with petitioners' knowing

use of the boat to carry marijuana. In addition, it does not appear that petitioners made a specific discovery request for the name and location of the marina (see 1 Tr. 4-11). Since the particular information the prosecution is now accused of withholding could not possibly have been recognized as exculpatory in the absence of a request by the defense indicating its potential relevance to the case, petitioners are plainly not entitled to relief on this ground; due process does not demand prosecutorial clairvoyance.¹ Moreover, a Coast Guard boatswain testified early in the trial that the boat was unable to proceed under its own power from the Coast Guard station to the marina (1 Tr. 36-37). Thus, evidence from the marina would have been cumulative at best and would not materially have advanced the defense case. See *United States v. D'Antignac*, 628 F.2d 428, 436 (5th Cir. 1980), cert. denied, 450 U.S. 967 (1981); *United States v. Robinson*, 585 F.2d 274, 281 (7th Cir. 1978) (en banc), cert. denied, 441 U.S. 947 (1979).

Petitioners also claim (Pet. 14) that the government failed to disclose information from an inventory of the boat's contents, which allegedly included oil cans, tools, and a toolbox, and thereby deprived petitioners of exculpatory evidence that would have supported their innocent explanation. Again, it is doubtful that such information, which apparently was not requested by the defense and the existence of which was presumably already known to petitioners, constitutes *Brady* material. The presence of tools and a toolbox on a boat is not an unusual occurrence (1 Tr. 37). In

¹Even if this were to be treated as a case in which prosecution files contained recognizably exculpatory but unrequested evidence, no relief would be warranted unless the undisclosed information would have created "a reasonable doubt that did not otherwise exist." *United States v. Agurs*, 427 U.S. 97, 112 (1976); see also *United States v. Mangieri*, 694 F.2d 1270, 1288 (D.C. Cir. 1982). The *Agurs* standard plainly is not satisfied here.

any event, the jury was informed that oil cans and tools had been found on the boat. The Coast Guard boatswain testified that a toolbox and a few cans of oil were present on the boat when it was seized (1 Tr. 36-37, 53-54, 58-60).² Thus, as in the case of information about the marina, introduction of the inventory to establish the presence of tools or oil cans on the Happy Days would have provided only cumulative evidence.³

Finally, petitioners contend (Pet. 13, 14) that the government withheld evidence of a report that three men were seen running from a grounded Cigarette boat that was found to contain 84 bales of marijuana. They claim that the report would have substantiated their story about the three men who hired petitioners to repair the Happy Days and left on the Cigarette boat. However, government witnesses testified about the discovery of a Cigarette boat and its cargo of marijuana on a sandbar one or two miles from the Happy Days' position and the report of three men abandoning it (1 Tr. 35-36, 46, 60-64, 82-83, 109). Thus, evidence concerning that incident was not withheld from the jury or petitioners. Assuming *arguendo* that the report was *Brady* material, any theoretical pre-trial *Brady* violation is of no significance, because the evidence was presented at trial. See *United States v. Kopituk*, 690 F.2d 1289, 1339-1340

²The boatswain also testified that the toolbox was closed and that he saw no indication that anyone had been working on the engines prior to the boarding (1 Tr. 59-60). In addition, photographs of petitioners taken after their arrest indicate that they did not appear unusually greasy or dirty as if they had been repairing engines (Gov't Exhs. 7-A, 7-B; see also Tr. 52, 143-145).

³Moreover, even if empty oil cans on the Happy Days would constitute exculpatory evidence, it is uncertain whether the inventory list would have included them. A DEA agent explained that Customs officers probably would have thrown the cans into a garbage bag, possibly without inventorying them (2 Tr. 59-60).

(11th Cir. 1982), cert. denied, Nos. 82-1530 and 82-1533 (May 16, 1983); *United States v. Kubiak*, 704 F.2d 1545, 1549-1550 (11th Cir. 1983); *United States v. Xheka*, 704 F.2d 974, 981 (7th Cir. 1983).

2. Petitioners further contend (Pet. 19-23) that they were deprived of a constitutional right to privacy by the introduction of statements they made during post-arrest telephone calls at a Coast Guard station in the presence of a DEA agent. Petitioner Wright called his wife and told her that he had "been running dope" and had been caught (2 Tr. 39-40), and petitioner Weech told the person he called that "they got me" (2 Tr. 41). Petitioners made these statements in the course of talking on pay telephones in a public area, while a DEA agent was standing openly next to them.

Petitioners claim that after they had been in custody "around eight hours" (Pet. 19), the DEA agent deliberately denied them the use of a private telephone and made them use a public pay telephone in his presence.⁴ The agent allowed petitioners to use the pay telephone as an alternative to the normal DEA practice of allowing a telephone call only after an individual has been taken to Miami (1 Tr. 116). The agent testified that he stood close to petitioners for security reasons (2 Tr. 16, 20-21). The record shows that petitioners did not seek leave to telephone their attorneys or to make a call in private (2 Tr. 4).

Petitioners' claim that they had a constitutional right to make their telephone calls in private is without merit. Although the Constitution may prohibit surreptitious eavesdropping in certain circumstances or intrusion into a prisoner's relationship with his attorney (neither of which occurred here), it does not require that a prisoner be

⁴In fact, petitioners had been in custody "five or six hours" following their arrest at sea (1 Tr. 38, 44; 2 Tr. 17, 138).

afforded a private telephone call to a spouse or friend during post-arrest processing. Moreover, petitioners did not have any reasonable expectation of privacy in the contents of telephone conversations carried on when a law enforcement officer was standing an arm's length away. See *United States v. Eisler*, 567 F.2d 814, 816 (8th Cir. 1977); cf. *United States v. Congote*, 656 F.2d 971, 976 (5th Cir. 1981). The agent was not hidden; in fact, petitioner Wright testified that he was handcuffed to the agent during the telephone call and that he knew the agent could hear every word he said (2 Tr. 109, 211).⁵ Under those circumstances, it is clear that petitioners' admissions are not constitutionally protected from evidentiary use.⁶

⁵Because the agent's presence was obvious, petitioners' reliance on *Katz v. United States*, 389 U.S. 347 (1967), is misplaced. As petitioners acknowledge (Pet. 20), *Katz* holds that "[w]hat a person knowingly exposes to the public * * * is not a subject of Fourth Amendment protection." 389 U.S. at 351. Nor is the situation in this case comparable to the electronic eavesdropping in *Lanza v. New York*, 370 U.S. 139 (1962), or the surreptitious post-indictment interrogation in *Massiah v. United States*, 377 U.S. 201 (1964).

⁶Petitioners' suggestion (Pet. 22) that their "waiver" of an expectation of privacy was involuntary is frivolous. Their inculpatory admissions were not coerced by government action, nor was their will overborne by the conditions or the period of detention necessary for post-arrest processing. Petitioners were free to explain in the telephone calls that they had been arrested, without admitting or implying their guilt.

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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